

Michael H. Carpenter (0015733)
Jeffrey A. Lipps (0005541)
Angela M. Paul Whitfield (0068774)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
(614) 365-4100
(614) 365-9145 – Facsimile
carpenter@carpenterlipps.com
lipps@carpenterlipps.com
paul@carpenterlipps.com

Attorneys For Defendant-Appellant
GMAC LLC

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE.....	1
STATEMENT OF AMICI'S INTERESTS	1
ARGUMENT	2
I. <u>Proposition of Law No. I: R.C. 4549.46 is not a strict liability statute</u>	2
CONCLUSION.....	5
PROOF OF SERVICE.....	6

TABLE OF AUTHORITIES

Cases

<i>Falasco v. Bishop Motors, Inc.</i> (Nov. 7, 1990), Summit App. No. 14637	4
<i>Hubbard v. Bob McDorman Chevrolet</i> (1995), 104 Ohio App.3d 621	4
<i>State v. Burrell</i> , Allen App. No. 1-07-52, 2008-Ohio-1785	4
<i>Vaughn v. Am. Honda Motor Co.</i> (Sept. 28, 2007), E.D.Tex. No. CIV. A. 2:04-CV-142	3

Statutes

R.C. 1.47(C)	4
R.C. 2901.21(B)	4
R.C. 2929.14(A)(4)	3
R.C. 2929.18(A)(3)(d)	3
R.C. 4505.06	1
R.C. 4549.46	1, 2, 5
R.C. 4549.46(A)	1, 3, 4
R.C. 4549.46(D)	3
R.C. 4549.50	3

Regulations

Ohio Adm.Code 4501:1-3-09	4
---------------------------------	---

STATEMENT OF THE CASE

The Attorney General alleges that GMAC violated R.C. 4549.46(A) when it truthfully provided odometer disclosures upon transferring ownership of vehicles leased through an Ohio dealership, Midway Motor Sales, Inc.

When the vehicles were sold, GMAC completed odometer disclosure affidavits prescribed by the state. GMAC entered the physical odometer reading at the time of sale. GMAC later learned that the odometers on some of the vehicles had been rolled back.

In pertinent part, Count Two of the Attorney General's complaint alleged that Midway and GMAC "violated R.C. 4549.46 by failing to provide the true odometer disclosures required by R.C. 4505.06." The Attorney General filed a motion for affirmative summary judgment against GMAC on Count Two regarding R.C. 4549.46 only. The motion was granted by the Franklin County Court of Common Pleas and the Attorney General dismissed the remaining counts of the complaint against GMAC. GMAC appealed. The Franklin County Court of Appeals upheld the trial court's grant of summary judgment against GMAC, finding that R.C. 4549.46 is a strict liability offense. This Court accepted jurisdiction on October 15, 2008.

STATEMENT OF AMICI'S INTERESTS

Amicus Curiae National Automobile Dealers Association (NADA) is a national trade organization for franchised new automobile or truck dealerships. NADA represents 19,000 franchised automobile and truck dealers who sell new and used motor vehicles and engage in service, repair and parts sales. Together they employ in excess of 1.1 million people nationwide yet a significant number are small businesses as defined by the Small Business Administration. NADA represents 800 light-duty motor vehicle dealerships located in Ohio.

Amicus Curiae Ohio Automobile Dealers Association (OADA) is a political, economic and educational association created for and managed by Ohio franchised new automobile, truck and motorcycle dealers. For over 75 years, OADA has promoted the common interests of the automotive industry in Ohio and served as a liaison between dealers and their communities. OADA represents almost 1,000 Ohio dealerships that employ approximately 45,000 Ohioans.

NADA and OADA are greatly concerned about the needless and detrimental effects that the Tenth District Court of Appeals' ruling will have on our members (including criminal penalties and loss of licenses and jobs) in particular and commerce involving used vehicles transferred in, into, or out of the State of Ohio in general.

ARGUMENT

I. Proposition of Law No. I: R.C. 4549.46 is not a strict liability statute.

NADA and OADA applaud the Court for accepting this appeal, the outcome of which will clarify an issue of great importance to our members: whether R.C. 4549.46 is a strict liability statute. Like GMAC and fellow Amici Curiae American Financial Services Association and Association of Consumer Vehicle Lessors, NADA and OADA believe that R.C. 4549.46 has been incorrectly interpreted by prior cases. We appreciate this opportunity to supplement the well-reasoned and thorough analyses of the strict liability issue in the Merit Briefs submitted by GMAC and fellow Amici Associations. The arguments against strict liability are many, but this brief focuses on the consequences of strict liability for Ohio dealers, which include criminal penalties and loss of state licenses without any proof of culpable intent.

Although the Attorney General sought only civil remedies against GMAC (including declaratory and injunctive relief, reimbursement and civil penalties), the Ohio Odometer Rollback and Disclosure Act contains other enforcement provisions that could be devastating to

a dealer. First and foremost, the Act carries criminal penalties. R.C. 4549.46(A), the provision at issue in this appeal, states that “[n]o transferor shall fail to provide the true and complete odometer disclosures required by section 4505.06.” Whoever violates this provision “is guilty of an odometer disclosure violation, a felony of the fourth degree.” R.C. 4549.46(D).

In addition to criminal penalties that include a prison sentence of up to 18 months and a fine of up to \$5,000 (see R.C. 2929.14(A)(4) and R.C. 2929.18(A)(3)(d)), violation of the Act could cost a dealer his license. Under the Act, “[v]iolation of sections 4549.41 to 4549.46 of the Revised Code by any person licensed or granted a permit by this state as a dealer, wholesaler, distributor, salesman, or auction owner under Chapter 4517 of the Revised Code, is prima-facie evidence of intent to defraud and constitutes cause for the revocation or denial of the license of such person to sell any motor vehicle in this state.” R.C. 4549.50.

These adverse licensing actions are triggered by any violation of the Act, not any conviction under the Act. Thus, a finding of liability in a civil action—a virtual certainty under a strict liability standard—could jeopardize a dealer’s license. Rollback schemes by third parties like Midway may be unusual, but human and mechanical error, which may also lead to liability, are not. Indeed, like GMAC’s situation here, one recent case involving a different local, respected corporate citizen—American Honda Motor Company—underscores the fundamental unfairness in interpreting R.C. 4549.46 as a strict liability statute. In *Vaughn v. Am. Honda Motor Co.* (Sept. 28, 2007), E.D.Tex. No. CIV. A. 2:04-CV-142, plaintiffs in a nationwide class action against Honda alleged that odometers in 1999 through 2004 Honda Odysseys overstated mileage by 2.5% to 4%. The alleged problem was not intentional, but rather a mechanical error. Nonetheless, under the Attorney General’s position, and the ruling of the Tenth District Court of Appeals below, Honda would be strictly liable. And, possibly, all Honda dealers, or subsequent

owners, in the State of Ohio who transferred the mechanically altered vehicles could be found strictly liable as well. That cannot be what the Ohio General Assembly intended. Nor can it be intended that dealers be found strictly liable for even unintentional clerical typing errors, see *Falasco v. Bishop Motors, Inc.* (Nov. 7, 1990), Summit App. No. 14637 (holding a transferor liable for a discrepancy due to a clerical error), or for de minimus errors, see *Hubbard v. Bob McDorman Chevrolet* (1995), 104 Ohio App.3d 621 (holding a transferor liable for a discrepancy of a mere 318 miles).

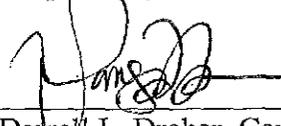
A conviction for violating R.C. 4549.46(A), which is a felony, will almost certainly result in license revocation or, at a minimum, denial of license renewal. See Ohio Adm.Code 4501:1-3-09 (providing that the registrar “shall deny the application of any person * * * for the renewal of a motor vehicle dealer’s license * * * if the registrar finds that the applicant has been convicted of a felony”). A strict liability standard has been applied in a criminal action for violation of R.C. 4549.46(A) in *State v. Burrell*, Allen App. No. 1-07-52, 2008-Ohio-1785.

These harsh penalties—particularly license revocation—cast serious doubt upon the General Assembly’s intent to impose strict liability for violation of R.C. 4549.46(A). The General Assembly could not possibly have intended to put dealers, salespersons, etc., in jail or bar them from selling cars in Ohio for an innocent and unknowing violation of the odometer disclosure requirement. This result would be unjust and unreasonable and contrary to R.C. 1.47(C), which requires us to assume that the General Assembly intended a just and reasonable result. When an individual’s freedom and livelihood are at stake, strict liability is inappropriate absent clear legislative intent to impose liability without mental culpability. See R.C. 2901.21(B). R.C. 4549.46(A) reveals no such intent.

CONCLUSION

The Tenth District's ruling must be reversed because R.C. 4549.46 has been inappropriately interpreted as a strict liability statute. This interpretation could unfairly and unreasonably trigger criminal penalties and enforcement provisions in the Ohio Odometer Rollback and Disclosure Act that would put dealers out of business for wholly innocent conduct. Such penalties require evidence that the General Assembly intended R.C. 4549.46 to be a strict liability statute and no such evidence exists.

Respectfully Submitted,



Darrell L. Dreher, Counsel of Record
Vanessa A. Nelson

Attorneys for Amici Curiae National Automobile
Dealers Association and Ohio Automobile Dealers
Association

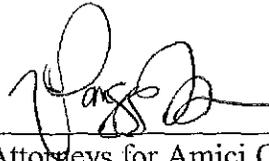
PROOF OF SERVICE

I certify that a copy of this Merit Brief was sent by ordinary U.S. mail on December 22,

2008 to:

Attorney for Plaintiff-Appellee:
Benjamin C. Mizer (0083089)
Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428

Attorney for Defendant-Appellant:
Michael H. Carpenter (0015733)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215



Attorneys for Amici Curiae National Automobile Dealers
Association and Ohio Automobile Dealers Association